No. 79-1213

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN,
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents

On Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF AMICI CURIAE OF THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS.

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BRIEF AMICI CURIAE OF THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS.

INTEREST OF AMICI CURIAE

The Department of Fair Employment and Housing and the Fair Employment and Housing Commission of the State of California are the agencies responsible, respectively, for the enforcement and adjudication of claims arising under the California Fair Employment Practice Act, Cal.Lab. Code §§ 1410-1433 (West 1971 & Supp. 1980), and the Rumford Fair Housing Act, Cal. Health & Saf. Code §§ 35700-35745 (West 1971 & Supp. 1980.)[1] The Fair Employment Practice Act creates a statewide remedy for victims of discriminatory employment practices. Under the Act the Department and Commission are mandated to safeguard the civil right of all persons to obtain and hold employment without discrimination on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age. Cal.Lab. Code §§ 1411, 1412. (West Supp. 1980). Consequently, California is a deferral state under section 706 of Title VII of the Civil Rights Act of 1964.

The Department of Fair Employment and Housing investigates complaints of discrimination, conciliates meritorious complaints when possible and initiates adversary proceedings before the Commission in those cases where conciliation efforts prove futile. In addition to its adjudica-

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[1]Pursuant to the Governor's Reorganization Plan No. 1, effective January 20, 1980, the Division of Fair Employment Practices and the Fair Employment Practice Commission, within the Department of Industrial Relations, were abolished and replaced by the Department of Fair Employment and Housing and the Fair Employment and Housing Commission within the State and Consumer Services Agency, which entities succeeded to the functions of the former Division and Commission. To codify this reorganization, the California Legislature adopted Assembly Bill No. 3165 which was signed by the Governor on September 10, 1980. As a result, effective January 1, 1981 the Fair Employment Practice Act and the Rumford Fair Housing Act will be combined to form the California Fair Employment and Housing Act and will be codified in the California Government Code at sections 12900 through 12966.

tory functions, the Commission is authorized to promulgate regulations interpreting and implementing FEPA. Finally, both the Department and Commission are routinely called upon to furnish technical guidance to public and private employers who are desirous of implementing voluntary programs to eliminate discriminatory employment practices. See Cal.Lab. Code §§ 1418, 1419, 1419.7, 1421-1425.5, 1431-1432 (West 1971 & Supp. 1980).

Amici have a substantial interest in the question whether a governmental entity may voluntarily adopt a race and sex-conscious, affirmative action program of limited duration to alleviate an underrepresentation of minority and women employees. A decision by this Court finding such voluntary affirmative action by governmental entities violative of Title VII or the Equal Protection Clause of the Fourteenth Amendment would severely impede *amici's* efforts to carry out the California Legislature's mandate.

Nothing in the Fair Employment Practice Act evidences any intent on the part of the California Legislature to preclude employers—public or private—from voluntarily implementing affirmative action plans to overcome the continuing effects of past discrimination. *Price v. Civil Service Commission* 26 Cal.3d 257, 276 (1980), *appeal dismissed as moot,* ..... U.S..... (1980). To the contrary in recent years the Legislature has enacted a number of statutory provisions which demonstrate an explicit legislative determination that such voluntary affirmative action fully accords with the State's firm committment to the principle of nondiscrimination. *Id.,* at 270; see Cal.Gov't Code §§ 19702, 19790-19797; Cal. Lab. Code §§ 1431, 1432(e) (West Supp. 1980).

Moreover, whatever success *amici* have achieved in implementing the objectives of the Fair Employment Practice Act has been largely dependent upon voluntary action by employers taken well before *amici* are compelled to invest substantial enforcement resources. In the past, voluntary measures by employers have often eliminated the need for

formal involvement by *amici* and have contributed to a high conciliation rate in California. Given *amici's* limited resources and the relative enormity of their task, any significant reduction in these voluntary measures would undermine their capacity to handle those complaints which require full investigation and hearing. Cf. *Allen v. State Board of Elections* 393 U.S. 544, 556 (1969). For example, in fiscal year 1979 *amici* received 7,970 complaints of discrimination in employment, approximately 985 or 12 percent of which were complaints against state (283) and local (702) governmental entities. In fiscal year 1980, *amici* received 8,970 complaint, approximately 1,037 or 12 percent of which were against state (237) and local (800) governmental entities. To handle this case load, presumably adequately safeguarding the rights of the parties involved, the Department has 91 investigators and 13 attorneys. The Commission employs 5 professional staff attorneys.[2]

Amici have received the written consent of the petitioners and respondents to file this Brief. Copies of the letters received are contained in Appendix A.

SUMMARY OF ARGUMENT

The 1972 Amendments to Title VII contemplate that public and private employers not only are subject to the same standards of liability for determining unlawful discrimination, *see e.g., Dothard v. Rawlinson* 433 U.S. 321 (1977), but also have the same opportunity to correct such unlawful conduct by implementation of voluntary affirmative action plans. Just as nothing in Title VII prohibits private employers from implementing appropriate race-sensitive or sex-sensitive affirmative action programs, *see United Steelworkers v. Weber* 443 U.S. 193 (1979), nothing statutorily pro-

[2]By statute, *amici* have jurisdiction over private employers and both state and local governmental entities. Cal.Lab. Code § 1413(d) (West Supp. 1980). The constitutionality of the Legislature's delegation to *amici* of jurisdiction over state employment covered by the California civil service is currently the subject of litigation. *State Personnel Board v. California Fair Employment Practice Commission*, 3 Civil 19549 (Cal. Ct. App., filed April 14, 1980).

hibits public employers from taking similar action under appropriate circumstances and in an appropriate manner.

Nor does the Constitution pose additional restrictions on the ability of public employers to remedy the effects of past discrimination. Every court that has addressed the issue has concluded that the 1972 Amendments represent a constitutional exercise of authority by Congress under § 5 of the Fourteenth Amendment. *E.g., Fitzpatrick v. Bitzer* 427 U.S. 445 (1976). Chief Justice Burger's lead opinion in *Fullilove v. Klutznick*, 65 L.Ed.2d 902 (1980), holds that Congress may enact legislation which not only requires states to take certain action but also expands the scope of constitutionally permissible action that they may undertake to avoid unlawful conduct. Thus, *amici* conclude that the constitutional limits on a state's use of an affirmative action employment program are no different than the limits established by Congress under Title VII.

Given the terms of Title VII and Congress' authority to enact remedial legislation which goes further than the substantive provisions of the Fourteenth Amendment, *amici* maintain that knowledge of significant minority or female under representation, unexplained by a business necessity that is likely to rebut a *prima facie* Title VII violation, is sufficient to warrant the institution of affirmative action remedies in public employment. Since the California Department of Corrections' program was designed to remedy significant minority and female representation in a manner that fully meets the *Weber* criteria, it is a statutorily and constitutionally permissible plan.

ARGUMENT

VOLUNTARY PUBLIC EMPLOYMENT AFFIRMATIVE ACTION PROGRAMS WHICH CONFORM WITH GOVERNING LEGISLATION THAT IS CONSTITUTIONAL ARE NOT CONSTITUTIONALLY INFIRM

In reviewing the constitutionality of race-sensitive affirmative action plans by public entities, the justices of

this Court have taken very different approaches. In *University of California Regents v. Bakke,* 438 U.S. 265 (1978), where the challenge was to the Davis Medical School's admissions program, there were 5 separate opinions filed. Last term in *Fullilove v. Klutznick,* ..... U.S. ....., 65 L.Ed.2d 902 (1980), which involved a 10% minority business enterprise set aside for all contracts let under grants to local governments pursuant to the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, there were 5 separate opinions. In neither case did any one opinion enjoy the support of a Court majority. This lack of even a minimal consensual viewpoint is due in part to the conceptual complexity underlying what is a new generation of constitutional issues in the continuing legal and social struggle to end discrimination against traditionally excluded groups.

In the past this Court focused most frequently on statutory schemes and governmental and private actions that separated, excluded, and, in effect, stigmatized minority group members. *E.g., Plessy v. Ferguson,* 163 U.S. 537 (1896); *Brown v. Board of Education,* 347 U.S. 483 (1954); *Jones v. Mayer,* 392 U.S. 409 (1968); *Loving v. Virginia,* 388 U.S. 1 (1967). The conceptual issues raised largely concerned the definition and establishment of a constitutional wrong. In the instant case, as in *Bakke* and *Fullilove,* the issues arise in a remedial context, where a governmental entity through the explicit consideration of race and sex seeks to redress the clear and substantial underrepresentation of minorities and women in fields of public opportunity.

These cases do not concern standards of proof for determining constitutional liability, as addressed by this Court in *Washington v. Davis,* 426 U.S. 229 (1976), but rather they involve the scope of permissible constitutional action by public agencies when, absent a court order, they seek to remedy the continuing effects of past discrimination.

There is no question that a court may order a private or public agency to devise and implement a race-sensitive remedy. Even in dissent in *Fullilove v. Klutznick*, 65 L.Ed. 2d at 954-955 n.4, Justice Stewart stated, "A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. *See Teamsters v. United States,* 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18-32 (1971)."

It is also clear from this Court's decisions that race-sensitive remedies initiated by other governmental entities are not *per se* unconstitutional. *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977); *University of California Regents v. Bakke,* 438 U.S. 265 (1978); *Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980). This position stems in part from this Court's often-stated view that public agencies have a legitimate interest, in some instances even a duty, to take remedial action when they knew or should have known about the racially discriminatory consequences of past policies and practices. *See McDaniel v. Barresi,* 402 U.S. 39, 41 (1971); *Board of Education v. Swann,* 402 U.S. 43, 45-46 (1971); *Green v. County School Board,* 391 U.S. 430, 437-438 (1968).

Last term in dealing with legislatively initiated action, a majority of this Court's justices, albeit for different reasons, found that Congress has considerable latitude when it seeks to redress racial underrepresentation through the utilization of a race-sensitive remedy. See the various opinions of Chief Justice Burger and Justices Powell and Marshall in *Fullilove v. Klutznick,* 65 L.Ed.2d at 908 (Burger, C.J.), at 935 (Powell, J.), at 949 (Marshall, J.). Similar latitude has also been extended to state legislatures acting under Congressional mandate. *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977). The questions now

before the Court concern the constitutional latitude to be afforded a state executive agency when, consistent with federal and state legislative goals, it seeks to redress racial and sexual imbalances in its work force.

In the instant case, the California Department of Corrections instituted a race-sensitive and sex-sensitive affirmative action plan to end what its top executives' regarded as substantial underrepresentation of minorities and women in its employment force, particularly the correctional force. The plan was adopted on July 1, 1974, some two years after the 1972 Amendments to the Civil Rights Act of 1964 extended Title VII coverage to discrimination in public as well as private employment. It also follows by 25 years California's enactment of its Fair Employment Practice Act, Cal. Lab. Code §§ 1410-1432 (West 1971 & Supp. 1980). During the pendency of this litigation, the California Legislature amended the Civil Service Act to underscore explicitly that affirmative action plans by state agencies are in accord with the state's commitment to the eradication of discrimination. Cal. Gov't Code §§ 19790-19797; *see also Price v. Civil Service Commission*, 26 Cal. 3d 257 (1980), *appeal dismissed as moot*, ... U.S. ..... (1980). In short, the actions now challenged did not occur in a legislative vacuum. They represent the efforts of an administrative agency to carry out not only its constitutional responsibilities to end the effects of discrimination but those responsibilities as further spelled out by Congress and the California Legislature.

In analyzing the constitutionality of the Department of Corrections' affirmative action plan, *amici* turn first to what remedies federal and state legislation either require or permit state agencies to undertake in order to end employment discrimination.

Amici then discuss the constitutionality of Title VII as it applies to public employers. It is *amici's* position that Department actions which conform with governing legisla-

tion that is constitutional are not constitutionally infirm. Otherwise, there is a constitutional double bind, where what the Fourteenth Amendment authorizes Congress and the states to undertake is found unconstitutional when carried out by administrative agencies charged with implementing legislative policy.

Lastly, *amici* address the factual circumstances and specific nature of the Department's affirmative action plan to determine whether it is consistent with governing legislation and thus the Constitution.

A. BOTH TITLE VII AND CALIFORNIA LEGISLATION PERMIT THE USE OF RACE-SENSITIVE AND SEX-SENSITIVE AFFIRMATIVE ACTION PROGRAMS BY PUBLIC EMPLOYERS

1. Private Sector and Public Sector Affirmative Action Programs Are Equally Permissible Under Title VII

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court upheld Kaiser Aluminum's affirmative action plan against a Title VII challenge mounted by a white employee excluded from a Kaiser crafts training program. The *Weber* Court did not address the legality of such a plan if enacted by a public agency. However, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a case involving the exclusionary effects of weight and height requirements on women seeking jobs as Alabama Correctional Counselors, the Court held that Title VII applies equally to public and private employers.

The legal issue in *Dothard* concerned the applicability in public employment discrimination cases of the adverse impact standard for determining a *prima facie* Title VII violation, as articulated in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), following the 1972 Amendments to Title VII. Citing the relevant legislative history,

the Court stated, ". . . Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R.Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971)." *Dothard v. Rawlinson*, 433 U.S. at 332, n. 14. The decision to extend Title VII to public employment was based on the Congressional finding "that wide-spread discrimination against minorities exists in State and local government." H.R.Rep. 92-238, 1972 U.S. Code Cong. and Admin. News, pp. 2137, 2152.

Chief Justice Burger's opinion in *Griggs* succinctly sets out the fundamental principles which animate Title VII, and which are now applicable to public as well as private employers.

> 1. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. at 430.
>
> 2. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.
>
> 3. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.
>
> "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." (Emphasis in original.) *Ibid.*

Consequently, since the 1972 Amendments public employers and private employers alike are liable for Title VII

violations even in the absence of discriminatory intent if they cannot meet the burden of showing that the discriminatory impact of their employment practices arises from an employment requirement necessary to the operation of their agency. Because purposeful discrimination need not be shown, statistics alone are sufficient to establish a *prima facie* case of employment discrimination in the public sector. *See Scott v. City of Anniston, Ala.*, 597 F.2d 897 (5th Cir. 1979); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1372-1373 (9th Cir. 1979); *United States v. City of Chicago*, 573 F.2d 416, 420-424 (7th Cir. 1978).

While this Court has repeatedly made clear its view that adverse discriminatory impact, when unrefuted by sufficiently job-related business employment requirements, will support the finding of a Title VII violation, and that such finding may lead to court-imposed hiring and promotional goals, *e.g., Albermarle Paper Company v. Moody*, 422 U.S. at 418, it has also emphasized the wisdom of voluntary compliance as an alternative to litigation. Perhaps the most quoted statement to this effect is found in *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974):

> "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. [Citations omitted.] Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a law suit."

The remedial scheme established by Title VII, in short, expresses a strong preference for voluntary compliance to root out the present exclusionary consequences of past employment practices. This expressed preference extends to both public and private employment. See H.R. Rep. 92-238, *supra,* at 2152-2154.

In *Weber*, this Court forcefully acknowledged that voluntary affirmative action programs were an integral part of Title VII's emphasis on voluntary compliance. Speaking for the majority, Justice Brennan stated,

> "[W]e cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to examine and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history,' [citation omitted] cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' [citation omitted] constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Weber,* 443 U.S. at 204.

If the sections of Title VII relied on by respondent in *Weber* do not prohibit race-sensitive affirmative action by private parties, there is no basis in light of the 1972 Amendments to Title VII to import additional statutory restrictions on public employers who undertake similar

action. Indeed, the 1972 Amendments are noteworthy in this regard not only because they extended Title VII coverage in its entirety to state and local employment but also because Congress, at the same time, specifically rejected attempts to restrain the courts from imposing quota remedies on findings of adverse impact alone. *See United States v. International Union of Elevator Constructors,* 538 F.2d 1012 (3rd Cir. 1976), for a brief summation of this history.

The *Weber* decision substantially lessened the quandary faced by private employers confronted with a disproportionate small percentage of minority and female employees, but hesitant to implement a voluntary affirmative action plan for fear of triggering a reverse discrimination action prosecuted by non-minority employees. Similarly, it makes no sense to leave public employers in what otherwise is the same statutory bind. They equally need the opportunity to correct potential Title VII violations without fear of a reverse discrimination suit.

Not surprisingly, those appellate courts which since *Weber* have ruled on voluntary affirmative action plans in the public sector have not hesitated to apply the full force of the *Weber* analysis when reviewing the permissibility of the specific plans under attack. *Price v. Civil Service Commission,* 26 Cal.3d 257 (1980), appeal dismissed as moot ..... U.S. ..... (1980); *Maehren v. City of Seattle,* 599 P.2d 1255 (1974); *Detroit Police Officers Association v. Young,* 608 F.2d 671 (6th Cir. 1979), *petn. for cert. filed* ..... U.S. ....., 48 U.S.L.W. 3558 (Jan. 10, 1980) (No. 79-1089); *see also United States v. City of Miami,* 614 F.2d 1322 (5th Cir. 1980). As Justice Keith of the Sixth Circuit sitting as a trial judge noted:

> "Title VII as applied to the public sector in 1972 is the same statute which the court interpreted in *Weber* as not barring voluntary affirmative action. And, unlike the uncertain 1964 legislative history reviewed by the

> Court in *Weber,* the 1972 legislative history clearly demonstrates Congress' approval of race-conscious remedies for past discrimination." *Baker v. City of Detroit,* 483 F.Supp. 930, 986, n. 105.

From a statutory standpoint, there is no basis for distinguishing the permissibility of affirmative action plans in the public sector from their permissibility in the private sector.

2. California Legislation Specifically Authorizes The Use Of Race-Sensitive Or Sex-Sensitive Affirmative Action Programs By State Agencies

The California legislature acted years before Congress to prohibit discrimination on the basis of race by private and public employers in California,[3] and to prohibit discrimination on the basis of race and sex in the state civil service.[4] After the enactment of Title VII, the legislature extended the prohibition against sex discrimination to private and local governmental employers as well.[5] The legislature also acted in the wake of this Court's opinion in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) to prohibit, respectively, any state or local agency's use of "educational prerequisites or testing or evaluation methods which are not job-related unless there is no adverse effect."[6]

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[3]*See* Fair Employment Practice Act, ch. 121, § 1, 1959 Cal. Stats. 1999 (current version at Cal. Lab. Code §§ 1413(d), 1420 (West Supp. 1980)).

[4]*See* Civil Service Act, ch. 123, § 1, 1945 Cal. Stats. 571 (current version at Cal. Gov't. Code § 19702 (West Supp. 1980)).

[5]*See* Fair Employment Practice Act, ch. 1508, § 4, 1970 Cal. Stats. 2995 (current version at Cal. Lab. Code §§ 1413(d), 1420 (West Supp. 1980)).

[6]*See* Government Code §§ 19702.2, 50085, Ch. 915, § 4, 1972 Cal. Stats. 1636; *see also* Hiring Practices: Legislative Review, 4 Pac. L.J. 629 (1973).

In the Spring of 1971, only weeks after the *Griggs* opinion came down, the Assembly Committee on Employment and Public Employees had held two days of hearings to consider whether the State of California's employment practices were discriminatory. *Hearings Relating to Charges of Discrimination in State Hiring Practices Before the California Assembly Committee on Public Employment and Public Employees (1971)*. The Committee had concluded that the State Personnel Board's practices probably had an unjustified, adverse impact on minorities. *Id* at 12, 17-18, 25-26.

With respect to the legality of affirmative action plans, the California Supreme Court has interpreted the State's basic anti-discrimination statute, the Fair Employment Practice Act (FEPA), as not prohibiting race-sensitive plans. *Price v. Civil Service Commission,* 26 Cal.3d at 276. In reaching this conclusion, the Court noted the similarity between the FEPA and Title VII and the fact that in some respects the FEPA goes further than Title VII in supporting the use of affirmative action. The Court observed:

> "Although the United States Supreme Court's interpretation of the antidiscrimination provisions of Title VII does not, of course, necessarily determine the appropriate interpretation of the antidiscrimination provisions . . . of the FEPA, we believe that those provisions should similarly not be interpreted to bar all such race-conscious affirmative action plans. First, the relevant provisions of . . . the FEPA arose out of the same historical context as the federal Civil Rights Act and were intended to achieve the same general objectives as the antidiscrimination prohibitions contained in the federal law. Second, additional features in . . . the FEPA demonstrate that [its] general ban on employment discrimination did not propose to inhibit the promulgation of effective affirmative action programs. . . . [For example] a recent legislative amend-

> ment of the FEPA specifically cautions that the statutory provision 'shall not be interpreted in such a manner as to adversely effect otherwise lawful state or federal programs which benefit the physically handicapped, the aged, low-income individuals, *minorities,* or women.' " [Citation omitted.] *Ibid.*

In 1977, the legislature added a new chapter to the Civil Service Act, entitled "State Civil Service Affirmative Action Program." Cal. Gov't Code §§ 19790-19797 (West Supp. 1980); *see* Ch. 943, § 2, 1977 Cal. Stats. 2876. The initial provision of the chapter, section 19790, provides in part: "Each agency and department is responsible for establishing an affirmative action program.... *Each agency and department shall establish goals and timetables designed to overcome any identified under utilization of minorities and women in their respective organizations.*" (Emphasis added.) This provision, in effect, represents legislative ratification of the course of action already undertaken by the California Department of Corrections, which is under challenge in the instant case.

In California, for state agencies, affirmative action is not just a permissible course of action but is now absolutely mandatory when there is an identifiable under-utilization of minorities or women. As discussed in the next section of this brief, this Court has been very solicitous of a state's use of racial criteria so long as it comports with and is reasonably tailored to accomplish the purposes of the Fourteenth Amendment. *See United Jewish Organizations v. Carey,* 430 U.S. 144 (1977).

B. THE FOURTEENTH AMENDMENT AUTHORIZES CONGRESS TO UNDERTAKE REASONABLE AND APPROPRIATE ACTION TO REMEDY THE CONTINUING EFFECTS OF PAST DISCRIMINATION

1. The Limitations Of The Fourteenth Amendment And Title VII On The Use Of Race-Sensitive Or Sex-Sensitive Remedial Programs Are Co-Extensive

As spelled out in Section A-1 of this brief, the 1972 Amendments to Title VII contemplate that public and private employers not only are subject to the same standards of liability for determining unlawful discrimination but also have the same opportunity to correct such unlawful conduct through the development of voluntary affirmative action plans. Just as nothing in Title VII prohibits private employers from implementing appropriate race-sensitive affirmative action programs, *United Steelworkers v. Weber*, 443 U.S. at 208, nothing statutorily prohibits public employers from taking similar action under appropriate circumstances and in an appropriate manner. The main issue here, therefore, is whether the Constitution poses additional limitations on the ability of public employers to remedy the effects of past discrimination, not applicable in the private sphere.

A threshold issue concerns the constitutionality of the 1972 Amendments. Without much explication, this Court already has acknowledged that the 1972 Amendments represent a constitutional exercise of authority by Congress under § 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court upheld the 1972 Amendments against a challenge that the Eleventh Amendment barred application to the states of provisions for awards of backpay and attorneys' fees, while in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), without explicitly addressing the constitutional issue, the Court extended the adverse impact standard or *Griggs* test for establishing a *prima facie* Title VII violation to the public sector.

The Court's sanguine view regarding the 1972 Amendments is in large part due to the broad power conferred upon Congress by Section 5 of the Fourteenth Amendment to enact more sweeping measures to remedy past discrimination than the minimum safeguards provided by the substantive provisions of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). Given the prerogatives accorded Congress under Section 5, each of the federal Courts of Appeals which, after *Dothard*, has explicitly addressed the constitutionality of Congress' extension of the adverse impact standard to state agencies has upheld it. *See United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Scott v. City of Anniston, Ala.*, 597 F.2d 897 (5th Cir. 1979); *Firefighters Institute for Racial Equality v. City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1979). As the Seventh Circuit stated and the Ninth Circuit reiterated: "[S]ince the 1972 Amendments are clearly rationally related to and consistent with 'the letter and spirit' of the Fourteenth Amendment, and the means chosen were not in themselves unconstitutional, . . . Congress could constitutionally incorporate the *Griggs* test into the 1972 Amendments." *United States v. City of Chicago*, 573 F.2d at 423-424; *Blake v. City of Los Angeles*, 595 F.2d at 1373-1374. There appears to be no dispute within the federal appellate judiciary that the requirements of Title VII as they apply to public entities are constitutionally sufficient, including the extension to the public sector of a lesser standard of intentionality for proving employment discrimination than required to establish a direct constitutional violation.

The issue in the instant case, however, does not involve what Title VII requires but rather what it permits state agencies to undertake in an effort to remedy the effects of past discrimination. In this regard Chief Justice Burger's lead opinion in *Fullilove v. Klutznick*, 65 L.Ed.2d at 908, is

especially helpful. There the issues concerned the constitutionality of Congress' minority set-aside program in the letting of public works contracts, a remedial device which parallels the use of race-sensitive or sex-sensitive remedies under Title VII.[7]

In discussing the inter-relationship between Congressional legislation and the Fourteenth Amendment, Chief Justice Burger in *Fullilove* placed great weight on the substantial latitude that Congress has to substitute its standards for determining and remedying unlawful discrimination for those directly provided by the Constitution. In support of this analysis, he stressed this Court's decisions in various Voting Rights Act cases. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *City of Rome v. United States*, ... U.S. ....., 64 L.Ed.2d 119 (1980). In particular, he underscored the authority of a state to "employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation." *Fullilove v. Klutznick*, 65 L.Ed.2d at 927. *See also United Jewish Organizations v. Carey*, 430 U.S. at 147-165 (opinion of Justice White joined by Justices Brennan, Blackmun and Stevens). Summing up his view regarding the general remedial consequences for state agencies of Congressional legislation to end discrimination, the Chief Justice stated:

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[7]Though Title VII does not specifically authorize the application of race and sex sensitive remedies, Congress at the time of the 1972 Amendments explicitly rejected any prohibition or additional limitations on their use. *See* Note, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 *University of Chicago Law Review* 723 (1972). Far from being outside the remedial scheme of Title VII, race and sex sensitive remedies are an integral part of Title VII in a manner not dissimilar from the 10% minority set-aside contained in the Public Works Employment Act of 1977.

> ". . . It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct." *Fullilove v. Klutznick,* 65 L.Ed.2d at 928.

In other words, Congress is able to enact legislation which not only requires states to take certain action but also expands the scope of constitutionally permissible action that they may undertake to avoid unlawful conduct.

As this Court found in *Weber,* race-sensitive remedies, when properly tailored and appropriately applied, are part-and-parcel of the remedial scheme established by Congress to redress employment discrimination. The 1972 Amendments to Title VII, which brought state employment within the confines of this remedial scheme, already have been upheld as constitutional. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). In light of this Court's decisions concerning other civil rights legislation enacted by Congress, the constitutional limits on a state's use of a race-sensitive or sex-sensitive affirmative action plan in employment are no different than those limits established by Congress. *See Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980); *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977). Accordingly, a state need not show that there is a direct constitutional violation before utilizing racial or sexual criteria. *See South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *City of Rome v. United States,* 64 L.Ed.2d 119 (1980).

In *University of California Regents v. Bakke,* 438 U.S. 265 (1978), five justices (Brennan, White, Marshall, Black-

mun and Powell) agreed that Title VI of the Civil Rights Act of 1964 went no further in prohibiting the use of race than the equal protection clause of the Fourteenth Amendment itself. *Id.* at 325. Given the particular remedial scheme of Title VII, the converse in the instant case is equally true: That is, the Fourteenth Amendment goes no further in prohibiting the use of race than Title VII. In short, if a public employer's use of a race- or sex-sensitive remedy is in conformity with Title VII, it is constitutionally sufficient.

2. Affirmative Action Programs Which Meet The Weber Criteria And Which Seek To Rectify Significant Minority Or Female Underrepresentation In The Work Force Are Constitutional

The specific legal issues left to be considered are the circumstances that warrant a state agency voluntarily undertaking race-sensitive and sex-sensitive remedial action and the type of affirmative action program that is legally supportable.

This latter issue was essentially settled in the *Weber* case, when this Court set out four general criteria for determining "the line of demarcation between permissible and impermissible affirmative action plans." *United Steelworkers v. Weber,* 443 U.S. at 208. First, the plan has to be designed "to break down old patterns of racial segregation and hierarchy." Second, it cannot "unnecessarily trammel the interest of white employees," such as requiring their discharge. Third, it cannot create "an absolute bar to the advancement of white employees." And fourth, it has to be a temporary measure. *Ibid.* Given the symmetry of Title VII's applicability to private and public employers, there is no arguable basis for not applying these same criteria to race-sensitive or sex-sensitive affirmative action programs implemented by governmental agencies. *Price v. Civil Service Commission,* 26 Cal. 3d at 274-276; *Maehren*

v. City of Seattle, 599 P.2d at 1269; *Detroit Police Officers Association v. Young,* 608 F.2d at 696.

The type of situation that supports the remedial use of racial or sexual classifications by a public entity is, however, a muddied issue. There appears to be no consensus among the justices of this Court as to what interest and what findings are needed before a state agency may institute an affirmative action remedy. Within the relatively clear confines of Title VII, the Court has here an opportunity to reach just such a consensus.

As previously discussed, the Court already has upheld the application of the adverse impact standard in public employment discrimination cases. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). Consequently, significant underrepresentation of minorities or women in a governmental job category places the government agency involved in a precarious position with respect to Title VII liability. It would indeed be a strained reading of the Constitution if governmental agencies under such circumstances were not able to take appropriate action to correct the very conduct Title VII prohibits and seeks to redress. *Cf., Fullilove v. Klutznick,* 65 L.Ed.2d at 932. It is *amici's* position, therefore, that knowledge of significant minority or female underrepresentation, unexplained by a business necessity that is likely to rebut a *prima facie* Title VII violation, is sufficient to justify the development and implementation of a race-sensitive or sex-sensitive affirmative action program.

This position is similar to the one advocated by Justice Brennan on behalf of himself and Justices White, Marshall and Blackmun in *Bakke,* when he stated:

> [A] state government may adopt race-conscious programs if the purpose . . . is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. *Bakke,* 438 U.S. at 369.

It is a rare situation when significant minority or female underrepresentation is not, at the very least, a strong indication of the lingering effects of past societal discrimination.

Amici's position is also not inconsistent with positions endorsed on different occasions by Justices Stevens, Stewart and Rehnquist and Chief Justice Burger. In *Bakke,* these justices expressed no view on the permissibility of race-sensitive affirmative action plans in public employment. In other governmental contexts, however, they all have supported the remedial use of racial criteria to benefit minorities, so long as the plan adopted was consistent with Congressional or state legislation itself constitutional and did not represent a slur or stigma on whites nor constitute purposeful discrimination against whites. *See United Jewish Organizations v. Carey,* 430 U.S. at 165 (White, J.); *id.* at 179-180 (Stewart, J.); *see also Fullilove v. Klutznick,* 65 L.Ed.2d at 929-933 (Burger, C.J.).

Only Justice Powell consistently maintains that before the imposition of a race-sensitive remedy by a governmental agency, there must be a finding of prior international discrimination against the benefitted group or a comparable compelling state interest. *See University of California Regents v. Bakke,* 438 U.S. at 307, 309-310; and *Fullilove v. Klutznick,* 65 L.Ed.2d at 936-937. As will be shown shortly, with respect to the instant case, the record is sufficient to satisfy either *amici's* proposed reformulation of the Brennan test or the Powell test.

In summary, it is *amici's* position that although the *Weber* Court specifically declined to consider the legality of affirmative action employment programs in the public sector, *United Steelworkers of America v. Weber,* 443 U.S. at 200, and, thus, did not discuss the constitutional issues addressed here, the compelling logic of the Court's decision, for all intents and purposes, applies with equal force to affirmative action programs instituted by govern-

mental agencies. Section 5 of the Fourteenth Amendment vests in Congress substantial latitude to exceed the substantive terms of the Amendment in order to accomplish the Amendment's remedial purposes. *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980). So long as Title VII is plainly adapted to that end and consistent with the letter and spirit of the constitution, and so long as the affirmative action program as carried out by a public agency is permissible under Title VII, this Court need look no further to uphold the program's constitutionality.

The Fourteenth Amendment authorizes Congress to undertake reasonable and appropriate action to remedy the continuing effects of past discrimination. Title VII is such legislation equally applicable to public and private employers. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). State action in conformity with Title VII is constitutional.

C. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN FURTHERS THE GOALS OF TITLE VII AND STATE NON-DISCRIMINATION STATUTES AND IS CONSTITUTIONAL

1. This Plan Was Developed In Response To The Significant Underrepresentation of Minorities And Women In The Department's Labor Force

The circumstances confronting the California Department of Corrections in 1974 warranted the voluntary adoption of race-sensitive and sex-sensitive remedial action. In brief, those circumstances were as follows:

(1) There was a significant underrepresentation of minorities and women employed by the Department relative to their representation in the California labor force, particularly at the California prisons and in certain job classifications.[8]

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[8]The California labor force is an appropriate measuring rod since notice of examinations for civil service vacancies are ordinarily

The evidence reveals that historically most of the institutions under the California Corrections Department (CDC) were staffed almost exclusively by white males. C.T. 502; *see also* R.T. 547, 593, 879, 892-893.[9] In 1968, when the CDC initiated its first informal affirmative action efforts, Caucasians constituted approximately 90.5% of the staff. Ex. "Q" at 1. In 1973, minority members totaled 19.8 per cent of total personnel in contrast with 23.7% of the California labor force. Ex. "G" at 26. Looking at the prisons alone—*i.e.*, excluding the parole division and central office—the evidence shows an even greater underrepresentation of minorities, particularly at some institutions. Ex. "G" at 29. With clerical and lower-level positions excluded, the disparity was still more pronounced. Ex. "G" at 21-22, 33-34. For example, of the 186 correctional lieutenants employed in September 1973, 95 per cent were Caucasian; of 400 correctional sergeants, 89 per cent were Caucasian; of 33 Correctional Counselor III's, 94 per cent were Caucasian. *Id.* at 34.

Much the same was true for CDC's female employees. In 1973, only 17.3 per cent of the total personnel were female in contrast with 38.1 per cent of the California labor force. Ex. "G" at 27. Again looking at the prisons alone, at only two institutions (one of which was the California Institute for Women) did the proportion of females exceed 13 per cent. Ex. "G" at 31. Moreover, more than 75 per cent of the female employees were in clerical positions. Ex. "G" at 35.

(2) There was a substantial underrepresentation of minorities in comparison to their representation in the

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distributed throughout the state. *Hearings Relating to Charges of Discrimination in State Hiring Practices Before the California Assembly Committee on Employment and Public Employees* 1, 19-29 (April 28, 1971).

[9]C.T. refers to the Clerk's Transcript in this case; R.T. refers to the Reporter's Transcript; Ex. as used subsequently refers to the Trial Exhibits contained in the record on appeal.

prison inmate population which impaired, *inter alia,* the Department's ability to combat racial violence in the prisons and maintain prison security.

Indeed, the evidence reflects a sharp contrast between the minority inmate population and the correctional work force. In 1976, the total inmate population contained 32 per cent blacks, in contrast to 10.7 per cent within the correctional force, and 21 per cent Mexican-Americans, in contrast to 9.8 per cent in the work force. *See* Ex. "K" at 9, 10. At many institutions, the disparity was even greater. *See* Ex. "K" at 8.

Testimony adduced during the trial below established as well the pervasive presence of racial gangs in California's prisons, R.T. 340-41, 476, 560, 627, 899, and the ever-present danger of racial violence. *E.g.,* R.T. 548-64, 896-99. Major disturbances have brought the racial tensions that plague the prisons and the manner in which prison conditions themselves foster violence forcefully to public attention. *See, e.g.,* New York State Special Commission on Attica, *Attica*: *The Official Report,* 39-40, 79-82, 106-07 (1972). *See also, Wolff v. McDonnell,* 418 U.S. 539, 561-62 (1974).

Finally, both the evidence and the academic and legal literature confirm the Department's view that the presence of minority officers would reduce inter-racial friction and violence by improving inmate-officer communication, *e.g.,* R.T. 478-79, 550, 564-65, 591, 654-55, 842, 846-47, 853, 893-99, 903, rapport, *e.g.,* R.T. 324-25, 343-44, 383, 892-901, and understanding, *e.g.,* R.T. 896-97. *See generally* Keldgord, "New Directions for Corrections," 36 *Fed. Probation* 3 (1972).

(3) In 1972, the California Legislature amended the Civil Service Act to make the *Griggs* impact standard clearly applicable to state agencies. *See* Cal. Gov't Code § 19702.1 (West Supp. 1980). Thus when the CDC adopted

this plan in 1972, the agency was under an explicit state duty to remedy the underrepresentation of minorities and women in its work force.

(4) There was, in addition, evidence of prior race and sex discrimination within the Department itself. *E.g.,* R.T. 212-13; 370-372; 706-708; 867-73.

(5) Finally, public records establish that the Department had utilized male sex as a requirement for the position of correctional officer and that this requirement had not been validated as a bona fide occupational qualification. Michael Frost, the Assistant Secretary of the State Personnel Board, so testified in the Fall of 1974:

> [T]he two classes where sex has been a requirement are California Highway Patrol Officer and Correctional Officer in the Department of Correction. With both of those now there are programs to get females in these occupations. So that—but they have not been part—if you are asking have they been part of the validation process that we have gone through, no, they have not. . . . *Hearings Relating to Equal Employment Opportunity In State Service Before The Assembly Committee on Employment and Public Employees* 1, 42-43 (1974).

In sum, the circumstances confronting the Department in 1974 support its voluntary adoption of a race-sensitive and a sex-sensitive affirmative action plan. The Department knew there was significant underrepresentation of minorities and women in its labor force and had reason to believe this underrepresentation was not justifiable by any legitimate operational need. This situation certainly falls within the ambit of the Brennan test set forth in *Bakke,* particularly as reformulated by *amici.* Moreover, the Department's interests in maintaining prison security and reducing prison violence are sufficiently compelling to satisfy Justice Powell's prerequisites, especially if the Court takes judicial notice of the Department's post-trial admission of prior discrimination.

2. The California Department Of Corrections' Plan Fully Meets The Weber Criteria As To What Constitutes A Permissible Affirmative Action Plan

The *Weber* criteria require that a race or sex-sensitive affirmative action plan be designed to break down old patterns of racial segregation and hierarchy, not unnecessarliy trammel the interests of white employees nor bar their advancement, and be temporary. See Section B-2 of this Brief, at p. 20. A plan which satisfies these requirements is both statutorily and constitutionally permissible.

First, as demonstrated above, the CDC's objective of increasing significantly the utilization of minorities and women across organizational units of the correctional system and at all levels, as possible vacancies occur, *see* Ex. "G" at 1, was structured to eliminate conspicuous racial and sexual imbalances within the CDC, particularly in those occupations and departmental levels from which minorities and women had traditionally been excluded. Furthermore, additional evidence of past discriminatory practices within the Department further substantiates the remedial nature of the plan.

Second, the CDC's plan does not unduly trammel the rights of non-minorities or males, since it contemplates neither the discharge of non-minority or male workers nor their replacement with minority or female employees. *See* Ex. "G" at 1. Likewise the plan does not call for the selection of unqualified applicants over qualified ones. The plan operates within the bounds of conventional civil service rules. Any promotional or hiring selection CDC might make pursuant to the plan can only be from among persons already determined to be qualified and equally eligible for

a position.[10] Transfers are similarly governed. Cal. Gov't. Code § 19360 (West Supp. 1980).

Third, the plan is not an absolute bar to the advancement of non-minorities or males. In selecting from among equally eligible applicants, race or sex is only one factor among many considered. Under the plan, minority status and feminine gender represent a "plus" in an applicant's file but do not insulate the individual from comparison with all other applicants. *See* R.T. 195-97, 382-83, 488, 666-77, 707-08. Thus on its face the plan creates no absolute bar to the hiring, promotion or transfer of non-minority or male personnel. Rather the full qualifications of each applicant are to be considered in the light of the Department's needs.

It is true that the plan established specific goals. These were to arrive at a proportion of the women in the correctional workforce equal to their proportion in the California labor force and to arrive at a proportion of each minority group equal to 70 percent of its proportion in the inmate population. Ex. "G". Goals which seek the same percentage of minorities or women among employees as there are among the workforce, however, are ordinarily reasonable benchmarks. "[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the . . . composition of the population in the community. . . ." *Team-*

[10]Under civil service rules, when notified of a vacancy the State Personnel Board must certify to an appointing authority such as CDC either the names of the three individuals standing highest on the applicable employment list, or in some cases, the names of all individuals standing in the three highest ranks on the applicable list. Cal. Gov't Code §§ 19057, 19057.1 West Supp. 1980). The appointing authority has full discretion as regards selection from among the persons so certified. *Id.* The employment list from which such names are certified consists of all those who passed the qualifying examination which in turn is open to all who meet the minimum qualifications for the job. Cal. Gov't. Code §§ 18900, 18937 (West 1963).

sters v. United States, 431 U.S. 324, 339 n. 20 (1976). Moreover, the goal for minorities was substantially related to the attainment of legitimate and substantial interests of the Department, to wit: the reduction of violence and racial conflict within the state prison system, and maintenance of prison security.

Fourth, CDC's plan is temporary. Contrary to petitioner's assertion (see Petitioner's Brief at 39) the plan was not to be of unlimited duration. Like the *Weber* plan it was not intended to maintain racial or sexual balance, but rather to eliminate a manifest imbalance in the department's workforce particularly at various levels and in various occupations. Accordance of some weight to an applicant's sex or race in selection decisions was to end when the percentage of women in the workforce approximated the percentage of women in the California workforce in 1970, and the percentage of minorities approximated 70 per cent of their representation in the inmate population. Moreover, the plan itself provided that it was targeted to last only five years.

Finally, it is also important to note that any misapplication of the plan can be promptly and adequately remedied administratively. The Civil Service Act empowers the State Personnel Board to conduct investigations and to hold hearings concerning all matters relating to the operation of the civil service system. *See* Cal. Gov't. Code §§ 18670-18682. In addition, the facts of this case demonstrate that the CDC was itself responsive to complaints that the plan was being misapplied. When such incidents were brought to the attention of responsible administrators within the Department, they were promptly corrected. R.T. 684-86; *see also* R.T. 775-77, Exs. 35, 37. Thus the administrative review process available under the Civil Service Act and the Department's own responsiveness to misguided applications of the plan gives reasonable assurance that its operation can be limited to accomplishing its legiti-

mate and remedial objectives and that any misapplication can be [and was] remedied promptly. *See Fullilove v. Klutznick,* 65 L.Ed.2d at 926. In this regard, *amici* believe it is telling that there is no individual before this Court who was deprived of, or denied any employment benefit by operation of the plan. *See* R.T. 921, 1335-36, 1339.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that this Court affirm the judgment below and hold that public as well as private employers may voluntarily adopt race-sensitive and sex-sensitive affirmative action plans to remedy the significant underrepresentation of minorities and women in their labor force, so long as such plans meet the *Weber* criteria.

Respectfully submitted,

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(Appendix A follows)

Appendix A

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August 1, 1980

Mark N. Aaronson
San Francisco Lawyers'
Committee for Urban Affairs
625 Market Street, Suite 1208
San Francisco, CA 94105

Re: Minnick v. California Department of Corrections, No. 79-1213

Dear Mr. Aaronson:

The petitioners in the above-entitled case hereby consent to San Francisco Lawyers' Committee for Urban Affairs filing an *amicis curiae* brief on behalf of the California Department of Fair Employment and Housing and the California Fair Employment and Housing Commission, in support of the respondents.

Very truly yours,
Carroll, Burdick & McDonough

/s/ Gary M. Messing
Gary M. Messing

GMM/jmp

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August 14, 1980

Mark Aaronson, Esquire
Lawyers Committee for Urban Affairs
625 Market Street, Suite 1208
San Francisco, California 94105

Re: Minnick v. California Department of Corrections
U. S. Supreme Court, No. 79-1213

Dear Mark:

This letter will serve as confirmation of our conversation of this date wherein I advised you that the California Department of Corrections has no objection to the filing of an *amicus* brief in the above referenced case on behalf of the California Division of Fair Employment and Housing and the Fair Employment Practices and Housing Commission. As you know, the deadline for filing a brief supporting the position of the Department is October 15, 1980.

Very truly yours,

/s/ Steven L. Mayer
Steven L. Mayer

SLM/lmc